Supreme Court, U.S.
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OFFICE C.

No._____

IN THE

Supreme Court of The United States

OCTOBER TERM 2000

ROBERT L. MOORE; CHESTER R. YOUNG; LINDA BAKER; ROYAL R. ASHTON; DAVID HOLLINS; RANDALL BYRD; LEON BRICE; RONNIE HUDNALL; WADE BROOKS; ANNIE M. KELLY; CHRISTOPHER G. LATSON,

Petitioners,

v.

JAMES A. LYNAUGH, individually and in his official capacity as the Director of the Texas Department of Criminal Justice; and TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION;

Respondents.

Petition For Writ of Certiorari to The United States Court of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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31 pp

QUESTIONS PRESENTED

Does racial discrimination against black employees in housing, job assignments, working conditions, discipline, and other terms and conditions of employment violate Title VII?

Is the employment discrimination prohibited by the anti-discrimination provisions of Title VII limited to discrimination that constitutes an "ultimate employment decision"?

Can the constitutional right to a jury trial be lost absent an explicit waiver?

Does the pendency of a class action or the intervention into a class action toll the limitations period for putative class members?

LIST OF PARTIES

Petitioners:

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Linda Baker
Royal R. Ashton
Randall Byrd
Ronnie Hudnall
Wade Brooks
Chester R. Young
David Hollins
Leon Brice
Annie M. Kelly
Christopher G. Latson

Respondents:

Texas Department of Criminal Justice, Institutional Division
James A. Lynaugh, former Director of TDCJ
Gary L. Johnson, Director of TDCJ

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The opinion of the Court of Appeals is not published. It appears in Appendix A at pp. 1a - 14a. The Findings of Fact and Conclusions of Law of the United States District Court for the Southern District of Texas are not published. They appear in Appendix B at pp. 15a -75a.

JURISDICTION

The United States Court of Appeals entered its judgment on October 12, 2000. App. A. The Court of Appeals denied Petitioner's Petition for Rehearing and suggestion for Rehearing En Banc on November 20, 2000. App. D pp. 89a - 91a. The Petitioners invoke the jurisdiction of the Court under 28 U.S.C. § 1257(1).

LEGAL PROVISIONS INVOLVED

U.S.C.A. Const. Amend. VII provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

42 U.S.C. § 2000e-2 provides:

(a) Employer practices

It shall be an unlawful employment practice for an employer --

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment

opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-3 provides:

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Federal Rule of Civil Procedure 39(a) provides:

(a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

STATEMENT OF THE CASE

A. Proceedings In The District Court.

The Petitioners are current or former black employees of the Texas Department of Criminal Justice ("TDCJ"), the agency that operates the Texas prison system. On February 2, 1988, the employees filed suit in the United States District

Court for the Southern District of Texas after their intervention in a pending class action was denied without prejudice. R.78 Ex. 1 p.7 The Petitioners alleged widespread racial discrimination by TDCJ in promotion, transfers, terminations, discipline, working condition, job assignments, housing and other terms and conditions of employment. RI. The Petitioners asserted claims under 42 U.S.C. § 1981, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. and the equal protection clause of the U.S. Constitution. *Id.* The Court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343; 42 U.S.C. § 2000e-5(f) and 28 U.S.C. §§ 2201, 2202. *Id.* In addition to their individual claims, Petitioners sought to represent a class of all black TDCJ correctional officers who were discriminated against with respect to promotions, transfers, job assignments, discipline, termination, retaliation, hostile work environment, and other terms and conditions of employment. *Id.* On August 10, 1995, the District Court denied class certification. App. C. Despite Petitioners' right to a jury trial on some claims, the District Court held a bench trial over Petitioners' protest in May 1998.

On March 31, 1999, the District Court entered Findings of Fact and Conclusions of Law (App. B), and a Final Judgment denying Petitioners all relief. App. E. In its decision, the District Court repeatedly held that Title VII does not bar discriminatory conduct, no matter how egregious, unless that conduct rises to the level of an "ultimate employment decision." App.B pp. 21a, 24a, 36a, 47a, 50a-51a, 55a, 65a - 66a. Therefore, according to the District Court, Title VII does not prohibit blatantly discriminatory terms and conditions of employment such as segregated housing or racially discriminatory job assignments because they are not "ultimate employment decisions." *Id.* Of particular interest here are several of the District Court's holdings.

1. "Charges that white officers were assigned to the new dormitory while black officers were assigned to the old, run-down dormitory that lacked heat are not cognizable under Title VII."App. B p. 55a.

2. "There was substantial testimony from a number of TDCJ officers, both Plaintiff and non-Plaintiff, indicating that Lieutenant Foster on the Retrieve Unit until his resignation in the (sic) September of 1986 was a racist first-shift supervisor who assigned white officers, especially those from his clique ("the silver bullet"), to the better and more desirable jobs in contravention of TDCJ's stated policy of rotating assignments. Such job assignments are not ultimate employment decisions or adverse actions actionable under Title VII." (internal record citations omitted).App. B p. 55a.

3. "Title VII was intended to address 'ultimate employment decisions,' such as hiring, granting leave, discharging, promoting, and compensating, but not to address every decision made by employers that might arguably have some tangential effect upon those ultimate decisions." App. B p.65a.

B. Proceedings In The Court of Appeals.

The Petitioners filed Notice of Appeal on April 3, 1999. R.228. Jurisdiction in the Court of Appeals was proper pursuant to Federal Rules of Appellate Procedure 3 and 4 and 28 U.S.C. § 1291. On October 12, 2000, the Fifth Circuit affirmed the judgment in an unpublished opinion. App. A. The Court of Appeals noted that the Petitioners had appealed "the district court's holding that the Petitioners' claims of segregated housing and other discrimination were not actionable under Title VII because there was no ultimate employment decision." App. A p. 9a. However the Court of Appeals never addressed this contention. The Court of Appeals also did not discuss the lower court's holding that discrimination against black employees in job assignments or other terms and conditions of employment did not violate Title VII. The Court of Appeals did, however,

indicate its assent to the District Court's reasoning by indicating that allegations of discriminatory discipline were not actionable because they were not "ultimate employment decision[s]." App. A p. 11a.

Petitioners petitioned the Fifth Circuit for rehearing and for rehearing en banc. The Fifth Circuit denied both petitions on November 20, 2000. App. D.

REASONS FOR GRANTING THE WRIT

This Court should grant a writ of certiorari because (i) the opinion of the Fifth Circuit conflicts with numerous precedents of this Court and of other Courts of Appeals; (ii) the Fifth Circuit opinion seriously undermines the protections this Court has ruled Title VII was intended to provide; and (iii) the Fifth Circuit's opinion severely weakens the constitutional right to a trial by jury.

A. The Courts Below Erroneously Held That Racially Segregated Employee Housing Does Not Violate Title VII.

Departing from nearly forty years of unbroken precedent, the Fifth Circuit affirmed the District Court's holding that various acts of blatantly discriminatory conduct are not actionable under Title VII or any other civil rights law.[1] The District Court addressed one of the most glaring examples of that conduct as follows:

> Charges that white officers were assigned to the new dormitory while black officers were assigned to the old, run-down dormitory that

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[1] Since the discriminatory terms and conditions existed from the commencement of an individual's employment (*i.e.*, TDCJ would only enter into inferior employment contracts with black employees), Petitioners' alleged that Respondents' conduct also violated 42 U.S.C. § 1981, 42 U.S.C. § 1983, and the equal protection clause of the fourteenth amendment.

lacked heat are not cognizable under Title VII. App. B p. 55a.

The Fifth Circuit allowed that ruling to stand. It is startling that in the year 2000, a federal court would hold that it is legal for the State of Texas to force black employees to live in racially segregated housing that is clearly inferior to the employee housing enjoyed by their white co-workers. However, in affirming the lower court opinion, that is precisely what the Court of Appeals did.

As suggested but not fully explained by the District Court, the housing was separate but hardly equal. App B p. 55a. The testimony showed that black officers who sought on-premises housing were segregated three or four to a room in the filthy, dilapidated old dormitory which lacked heat, air conditioning, and hot water. In contrast, white officers were housed two to a room in the clean and freshly painted new dormitory where they enjoyed heat, air conditioning, hot water, new furniture, new televisions, and laundry facilities. Moreover, segregation was maintained by TDCJ's policy of assigning black officers to the old dorm even when space was available in the new dormitory. V11:292; V17:189; V18:286-89; V20:735-36, 809-10; V21:879-80.

In departing from precedent and upholding the legality of the segregated, inferior housing, the District Court cited no authority. Similarly, the Court of Appeals affirmed the District Court's holding without reference to any authority. It is clear, however, that the decisions below upholding the legality of assigning black employees to facilities that are racially segregated and clearly inferior cannot be reconciled with either the explicit language of Title VII, the decisions of another Court of Appeals or the clear guideposts of this Court's numerous employment discrimination decisions.

42 U.S.C. § 2000e-2(a) bars discrimination "with respect to . . . terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(b) prohibits the racial segregation of employees and proscribes any employer action based on race

that would "adversely affect" an employee's status. From the statutory language itself, it seems obvious that the maintenance of a system of racially segregated employee housing where black employees are provided with substandard living quarters would constitute a violation of the anti-discrimination provisions of Title VII. Until this case, in fact, no court had ruled to the contrary. Furthermore, the Ninth Circuit, the only other Court of Appeals to directly consider this issue, has determined that employee housing is covered under Title VII and that it is illegal to discriminate with respect to such housing. *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1437, *modified on other grounds*, 742 F.2d 520 (9th Cir. 1984); *Atonio v. Wards Cove Packing Co.*, 827 F.2d 439, 448 (9th Cir. 1987), *rev'd on other grounds*, 490 U.S. 642 (1989). Analogously, cases construing "terms of employment" under the National Labor Relations Act have found employee housing to be such a term or condition of employment. *See e.g. American Smelting and Refining Company v. N.L.R.B.*,406 F.2d 552, 553-54 (9th Cir. 1969), *cert. denied*, 395 U.S. 935 (1969).

This Court has never specifically held that employee housing is a term, condition or privilege of employment covered by Title VII. However, with the decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), this Court has given a meaning to the phrase "terms, conditions and privileges" that is in conflict with the decision of the Fifth Circuit. In *Meritor Savings*, this Court said that:

> the "language of Title VII is not limited to economic or tangible discrimination. The phrase terms, conditions, or privileges of employment evinces a congressional intent to strike at the entire spectrum of disparate treatment of men

and women in employment."[2]

477 U.S. at 64 (emphasis added) (internal quotation marks and citations omitted). This Court further elaborated by noting that

> the phrase terms, conditions or privileges of employment in [Title VII] is an expansive concept which sweeps within its ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.

477 U.S. at 66 (internal quotation marks and citations omitted).

The essence of *Meritor Savings* and its progeny is that the "terms and conditions" language of Title VII is designed to combat any disparate treatment that creates a hostile or offensive working environment. Severe and pervasive harassment is a form of discrimination with respect to an individual's terms or conditions of employment even if no "ultimate employment decision" occurs. *See, e.g., Meritor*, 477 U.S. at 65-68. Housing discrimination should be no different.

This Court has reiterated the broad definition of terms, conditions, and privileges of employment in subsequent cases. Seven years after *Meritor Savings*, this Court reaffirmed its central message that Title VII imposes a "broad rule of workplace equality" in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993). Furthermore, as recently as its 1998 decisions in *Faragher*, 524 U.S. at 786, and *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 78 (1998), this Court has reiterated that the phrase "terms and conditions of employment" to which Title VII speaks is not to be construed in a narrow, contractual sense.

This Court should grant the writ to resolve the conflict

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2 The standards governing sexual and racial discrimination are generally analogous and thus cases involving one type of discrimination are of equal applicability to cases involving the other type of discrimination. *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 n.1 (1998).

of the Fifth Circuit opinion with those of other circuits and especially with those of this Court and reaffirm that the broad scope of Title VII applies to housing discrimination.

B. The Courts Below Erroneously Held That Racial Discrimination In Job Assignments Does Not Violate Title VII

Similarly, the Court of Appeals affirmed the District Court's holding that discriminatorily assigning black officers to dangerous and less desirable jobs does not violate Title VII. As stated by the District Court, it was not actionable under Title VII that a supervisory employee of TDCJ was:

> a racist first-shift supervisor who assigned white officers, especially those from his clique ("the silver bullet") to the better and more desirable jobs in violation of TDCJ's stated policy of rotating assignments . . . [because] Such job assignments are not ultimate employment decisions or adverse actions actionable under Title VII.

App.B p. 55a.

The Court further indicated that allegations that blacks were discriminatorily assigned "to the dangerous jobs at the pickets, in the showers, the wings and the tanks" were not actionable because such "[j]ob assignments are not actionable adverse employment actions unless they constitute a demotion." App. B p.24a.

In fact, the District Court's passing references to racially discriminatory job assignments does not come close to capturing the actual level of discrimination that prevailed at TDCJ. Black officers were continually assigned to the more dangerous jobs in the prison system. In particular, they were assigned to the "wing," "tank," "shower," and "administrative segregation" areas of the prison where they were locked in alone and unarmed with the most dangerous inmates. As a result, black officers were at a far greater risk of death and serious bodily

injury than their white colleagues, who were assigned in pairs to the less dangerous areas where inmate contact was reduced. Furthermore, it was standard policy during prison disturbances to substitute black officers for white officers in disturbance areas and to return white officers to those areas only after the danger had passed. Black officers were also discriminatorily assigned to undesirable posts that were permeated by the overwhelming stench of raw sewage and could only be reached by wading through raw sewage. Black officers were also discriminatorily assigned to hot outdoor postings that lacked bathroom facilities and drinking water. In contrast, white officers were disproportionately assigned indoor jobs. V16:24-27, 208-10; V18:288-89, 350-52; V19:407-11, 551; V20:719; V21:877, 950-52.

The affirmance by the Court of Appeals of the District Court's holding that these forms of discrimination are not the kind of discrimination to which Title VII was addressed cannot be reconciled with this Court's decisions on the expansive scope of Title VII. *See, e.g., Meritor*, 477 U.S. at 64-65. In fact, this Court has indicated that undesirable job assignments are of sufficent gravity to constitute actionable discrimination under Title VII. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 724, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998). As with its holding about segregated employee housing, the decision below eviscerates the express statutory protections of Title VII and fails to adhere to the binding precedents of this Court. This Court should grant certiorari to correct this aberration.

C. The Courts Below Erroneously Held That Racial Discrimination With Respect To Other Terms And Conditions of Employment Does Not Violate Title VII.

Having erroneously concluded that Title VII would not prohibit racially segregated employee housing or discriminatory job assignments, the District Court also erroneously held that:

> Title VII was [only] intended to address "ultimate employment decisions;" such as hiring, granting leave, discharging, promoting, and compensating but "not to address every decision made by employers that might arguably have some tangential effect upon those ultimate decisions."

App. B p. 65a.

The District Court then went on to indicate that Title VII would therefore not prohibit discrimination with respect to an "employee's work schedule, shift or hours;" "increasing an employee's workload;" "denial of training necessary for promotion;" "rude and uncivil treatment;" "hostility from fellow employees;" "disciplinary filings;" "[a] supervisor's reprimands, and poor performance [evaluations];" "lateral transfers;"or "denial of administrative complaints and grievances."App. B pp. 65a-66a. The District Court further indicated that any other instances of discriminatory conduct would not be actionable including: forcing blacks to drop out of school due to a shift change (App. B p. 47a) or sending blacks home for not shaving (despite compliance with a medical shaving pass,(App. B p.36a n. 22) by a supervisor who according to the evidence, stated he "did not take his orders from no black man"). V13:86-87; V16:71-73, 79-80;V18:360-37,372, 399; V19:604-05; 614-20 V22:1095-98. The Court of Appeals affirmed and added that "employee discipline, without more, is not an ultimate employment decision."App. A p. 11a.

> Black officers also were not issued winter gear; given inferior vehicles; refused commissary services; denied food in the field; not invited to TDCJ official social gatherings; strip searched; and denied bathroom privileges (to a point where medical treatment was necessary) by white supervisors who felt that such privileges were unnecessary because blacks had "big bladders." V13:5-9, 21-22; V17:215-16; V18:320,350-52; V19:413-14; Px. 183.

Furthermore, black officers with accumulated vacation days were denied days off even after giving significant notice. Blacks were denied time off to attend their own wedding, celebrate a twenty-fifth anniversary, or take a sick child to the doctor. In contrast, white officers were able to request and receive days off with little or no advance notice for non-emergency reasons such as to watch a sporting event. Black officers were also routinely assigned holiday duties so that white officers would be able to spend time with their families. V18:474-79; V21:877, 887, 889-90; V22:1102-03.

Blacks were forced to endure a disciplinary system that invested almost exclusively white disciplinary boards with unfettered discretion to impose discipline and determine punishment. This practice resulted in black officers being disciplined more frequently and more harshly than their white co-workers with blacks, for example, being disciplined, suspended, and terminated at rates 4 to 5 times the rate of their white co-workers. V10:70-71; V11:308, 312; Px. 66. The unfairness of the disciplinary system is evidenced by the fact that blacks were disciplined for imagined or non-existent violations such as smiling (V16:50-51) or not shaving in accordance with an authorized medical pass (V16:71-73, 79-80) while white officers committing far greater offenses were not disciplined. *See, e.g.*, V14:27-28; V16:35-51; V19:414-16, 556-67; 576-79, 584-88; V20:753, 762, 809, 811; V21:880-908. This discriminatory discipline system negatively affected black employees' promotional opportunities because under TDCJ's promotion policies, an employee on disciplinary probation is ineligible for promotion. Px. 3, 10, 12-13, 16-17, 19.

In addition to being negatively impacted by TDCJ's discriminatory discipline system, blacks were not provided the same promotional opportunities as whites in that they were not informed of job openings and were mistreated during the application process. *See e.g.* V10:157-59; V19:424-26. This did not bother the District Court which held, for example, that it was not actionable that a minority applicant received the lowest

possible score at a screening interview where the warden conducting the interview

> had his feet on the desk and read a hard-core [pornography] magazine the entire time, never looked at or spoke to . . . [the applicant] and never acknowledged . . . [the applicant's] presence . . . [because] Such behavior does not constitute an ultimate employment action.

App.B, p.21a; V10:157-59; V19: 424-26.

Furthermore, the lower courts failed to discern any violation of Title VII as a result of TDCJ's dismissal or inadequate review of grievances filed by black officers; refusal to provide black officers with grievance forms; punishment of officers who assisted black complainants; and threatening or disciplining of black officers who sought to file grievances. V13:83-85; V19:617; R.120 Ex. 1-12.

As a direct result of the decisions of the Court of Appeals and the District Court, Petitioners were left bereft of a remedy for the egregious racial discrimination they suffered with respect to the terms and conditions of their employment. As discussed above, the opinions of the lower courts that such odious forms of discrimination are not actionable under Title VII cannot be reconciled with Title VII's express language and expansive scope.

D. The Courts Below Confused Retaliation Cases With Terms And Conditions Cases

The District Court, affirmed by the Court of Appeals, ruled that Title VII does not bar any discriminatory action, no matter how egregious, so long as that action is not an "ultimate employment decision." The District Court and the Court of Appeals relied exclusively on the recent decisions of the Fifth Circuit which deal with the anti-retaliation provision of Title VII (42 U.S.C. § 2000e-3) where the Fifth Circuit has imposed a requirement that a retaliatory act must constitute an "ultimate employment decision" before a violation of Title VII will be

found to exist.[3] App. A p. 11a n.14; App. B pp. 65a-66a; *see, e.g., Dollis v. Rubin*, 77 F.3d 777 (5th Cir. 1995). Both the District Court and the Court of Appeals failed to perceive, however, that the anti-retaliation provision of Title VII is far narrower than the anti-discrimination provisions of Title VII which prohibit the "entire spectrum" of unlawful employment practices and which do not require that a discriminatory act rise to the level of an "ultimate employment decision" before a violation of Title VII will be found to exist. *See, e.g., Meritor*, 477 U.S. at 64; *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 708-09 (5th Cir.), *cert. denied*, 522 U.S. 932 (1997).

By engrafting the "ultimate employment decision" requirement onto a case such as the present one that involves segregation and discriminatory terms and conditions of employment, the lower courts have rendered Title VII into a toothless statute in which minorities who are subjected to racially segregated facilities, discriminatorily assigned to dangerous, undesirable jobs, and forced to endure other discriminatory terms and conditions of employment are left without any possibility of redress. This Court should not allow such a decision to stand and should therefore grant the writ to undo this serious weakening of the remedies available to victims of employment discrimination.

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[3] In light of this Court's recent decisions in *Faragher* and *Ellerth*, the continued viability of such a requirement seems quite infirm. However, this Court has never addressed the issue of whether Title VII's anti-retaliation provision contains a requirement that a retaliatory act rise to the level of an "ultimate employment decision" before liability will arise. As a result, there is currently a split in the circuits on this issue. *See Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1996) (acknowledging that "there is a circuit split on the issue"). Even if there is an ultimate employment decision requirement in the context of retaliation, that principle has no application to a case such as this one that is based principally not on retaliation but on disparate terms and conditions of employment.

E. Stare Decisis.

This Court has repeatedly stated that "the doctrine of *stare decisis* is of fundamental importance to the rule of law." *Patterson v. McClean Credit Union*, 491 U.S. 164, 172 (1989) (*quoting Welch v. Texas Dep't of Highways and Public Transportation*, 483 U.S. 468, 494 (1987). This is true because *stare decisis* "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals." *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986). Because of its importance, any departure from the doctrine of *stare decisis* requires "special justification." *Patterson*, 491 U.S. at 172. It is clear that no such justification exists in the present case and, in fact, compelling circumstances mandate the adherence to the doctrine of *stare decisis*.

This Court has recognized that our society has a "deep commitment to the eradication of discrimination based on a person's race or the color of his or her skin." *Patterson*, 491 U.S. at 174. In fact, "every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination." *Id.* (*quoting Bob Jones University v. United States*, 461 U.S. 574, 593 (1983). As such, the doctrine of *stare decisis* requires that this Court reverse the decisions of the Court of Appeals and the District Court which would eliminate the prohibitions against segregation and discrimination that have been so enshrined in our nation's conscience and common law. Anything less and the faith of large segments of American society in the rule of law would be shattered along with this Court's institutional reputation as the dispenser of equal justice.

F. Retrial and Reconsideration of Class Certification Are Required

In the event that his Court concludes that Petitioners' claims are cognizable under Title VII, then Petitioners submit that they are entitled to a new trial on all issues, since this Court has repeatedly emphasized that Title VII claims must be

evaluated in light of the totality of the circumstances. *See, e.g., Harris*, 510 U.S. at 23. Given that the lower courts completely ignored any discriminatory act they deemed to be outside the coverage of Title VII, a new trial or at least a remand for reconsideration is required. Although this is particularly true with respect to Petitioners' hostile work environment claims, it applies to all of the Petitioners' claims due to the intertwined nature of the claims and the fact that the acts of discrimination disregarded by the lower courts would be highly probative evidence germane to Petitioners' other claims.

Similarly, if this Court determines that the anti-discrimination statutes of Title VII are not limited to "ultimate employment decisions," then the lower courts' denial of class certification must be revisited as the lower courts' analysis of Petitioners' class claims completely ignored any discriminatory act not rising to the level of an "ultimate employment decision." If the discriminatory conduct ignored by the lower courts does fall within the ambit of Title VII, Petitioners would be suitable class representatives because the Petitioners suffered injuries identical to those of the class members they seek to represent (in particular that they were subjected to segregated housing, discriminatory job assignments, discriminatory discipline, a hostile work environment, and other discriminatory terms and conditions of employment) and the Petitioners satisfy all of the requirements of Fed. R. Civ. P. 23.

G. The Court Of Appeals Erroneously Held That The Right To A Jury Trial Could Be Lost Without The Existence Of An Explicit Waiver.

The Court of Appeals held that Petitioners had waived their right to a jury trial despite the complete absence of any act capable of constituting a waiver. App. A p.6a.

The Court of Appeals' holding is in direct conflict with this Court's decisions which uphold the fundamental importance of the constitutional right to a trial by jury and indicate that "courts indulge every reasonable presumption against waiver."

College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666, 682 (1999) (*quoting Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 307 U.S. 389, 393 (1937). The Court of Appeals' holding is also at odds with FED. R. CIV. P. 39(a) which provides that once requested, a jury cannot be waived absent a joint stipulation by the parties consenting to a bench trial, something which did not happen here.

On May 18, 1998, the first day of trial in this action, the parties and the District Court agreed that Petitioners had a right to a jury trial on some of their claims. V16:3-9.[4] The only issue was whether the jury claims would be tried first in accordance with this Court's opinion in *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 550 (1990) or would be separated out for trial at a future date. V16:3-9. Petitioners requested that a jury be empaneled and that all claims be tried to a jury whose verdict would be advisory as to the non-jury claims. V16:3-4. The District Court rejected this request and indicated that it intended "to start off with the bench trial part and then to do the jury parts later on." V16:6. The District Court's stated reason for doing so was that it had not empaneled a jury and did not want to wait the day or so to empanel the jury and conduct voir dire. V16:4-8. When Petitioners' counsel expressed confusion as to why no jury had been empaneled, it became clear that the case manager had been misled by Respondents' counsel into believing that the matter was to be tried initially to the bench. V16:4-5. Respondents' counsel sought to justify his actions by indicating that it was his understanding from the pretrial conference that the case would be tried first to the bench and the jury claims would be separated out "for a future date." V16:5.

Over the protests of Petitioners' counsel, the District

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[4] There was agreement that certain Petitioners had post-1991 Title VII claims although the exact number of these individuals was in dispute. V16:3-9. In addition, Petitioners submit that they had § 1981 and § 1983 claims that were never dismissed.

Court indicated it would not empanel a jury but would instead "start off with the bench trial part and then . . . do the jury parts later on" even though there was an overlap of issues and the case would have to be tried twice. V16:3-9. Their protests overruled, Petitioners had no choice but to proceed with the bench trial portion of the case. Petitioners were led to believe, however, that following the bench trial there would be a jury trial on the remaining claims. V16:6. However, the District Court issued a Final Judgment on all claims including the Petitioners' untried jury claims and closed the case, thereby depriving Petitioners of both their constitutional right to a jury and their due process right to be heard at all. App. E.

The Fifth Circuit found no error in the District Court's denial of Petitioners' constitutional rights. App. A p. 6a. Inexplicably, the Court of Appeals indicated without discussion or analysis that it was "persuaded that any rights to a jury trial were waived." *Id.* However, Fed. R. Civ. P. 39(a) provides there can be no such waiver except by written stipulation or an oral stipulation in open court. There was no such stipulation and no court has attempted to cite one. Futhermore, given the District Court's explicit statement that Petitioners' jury claims would be tried "later on" (V16:6), the Court of Appeals' determination is demonstrably false. The error of the Court of Appeals' opinion is further confirmed by the fact that the pretrial order filed May 13, 1998 called for a jury (R.206); the parties filed proposed jury instructions (V16:4-5); and the docket entry sheet for May 18, 1998, the first day of trial indicates it was "day 1 of Jury Trial" and that "Plaintiffs move to have entire case tried to jury as an advisory jury on non-jury issues."

Although it did not explain its ruling, the Court of Appeals indicated that its analysis involved a review of the record including the transcript of a pretrial conference held on April 19, 1998, a day when no pretrial conference was held. App. A p.6a. Assuming the Court of Appeals referenced the April 29, 1998 pretrial conference, the events at the April 29, 1998 pretrial conference would still not support its opinion as

the transcript of this conference indicates at best a desire to separate out the jury claims from the non-jury claims and does not evidence any waiver whatsoever of the right to a jury trial. This fact is confirmed by the docket entry for this conference which indicates "jury selection/trial set for 9:00 5/18/98." Furthermore, the subsequent pretrial order and the actions of the parties and the District Court indicate that no waiver occurred at this conference. R.206; V16:3-9.

The Court of Appeals also indicated that any denial of the right to a jury would be harmless if the Petitioners' claims would not have survived a directed verdict. App. A pp. 6a-7a. While this may be true, it is inapplicable to the present case where Petitioners' claims survived a request for a directed verdict. V23:1190. This Court should grant certiorari to correct the denial of Petitioners' constitutional rights to a jury trial. In light of the above, this decision should be reversed because of its grave weakening of the constitutional right to a jury.

H. The Court of Appeals Incorrectly Held That Petitioners' Claims Were Not Subject to Tolling.

The Court of Appeals conceded that a pending motion to intervene tolls the 90 day period after receipt of a right to sue letter. The Court of Appeals nevertheless held that several of the Petitioners could not rely on their motion to intervene in *Jones v. Texas Department of Corrections*, C.A. No. TY-87-364-CA to toll the 90 day period. App. A pp. 4a-5a. No legal support exists for this position. If allowed to stand the Court of Appeals' ruling will burden federal courts with duplicatives action and cause unnecessary barriers to judicial efficiency.

On February 24, 1987, Petitioners timely sought to intervene in *Cirillo v. Texas Department of Corrections* (C.A. No. TY--77-12-CA) which then encompassed *Jones*. App. B p.19a. n.8. On September 3, 1987, when *Jones* was severed from *Cirrillo*, the court denied Petitioners' intervention in *Cirillo* but explicitly held that its denial was "without prejudice to resubmission" thereby allowing Petitioners to seek to intervene

in the newly severed *Jones* action." R 78, Ex 2, p. 13. The court acknowledged that Petitioners' initial intervention was premised on the fact that "their rights were affected by the ongoing class action maintained by David Jones" and indicated the court's order was designed to allow Petitioners to "account for the new posture of Jones' action." *Id.*, p. 7, 12-13. Petitioners' intervention in *Jones* was denied on January 4, 1988. App. B p.19a n.8. This denial was explicitly premised on the *Jones* court's belief that "[t]here is no reason to presume that . . . [the Petitioners] cannot maintain their own action." R.78, Ex. 1 p.5-7. On February 2, 1988, Petitioners filed this action. R.1. The Court of Appeals held that while Petitioners' initial intervention in *Cirillo* was sufficient to toll the 90 day period, their subsequent intervention 14 days later into the newly severed *Jones* action did not result in tolling and as a result, the claims of several of the Petitioners would be barred. App. A pp. 4a-5a. This holding of the Court of Appeals ignores the fact that *Cirillo/Jones* was a single action when Petitioners first sought to intervene and Petitioners' second motion to intervene was not into an unrelated action but into a portion of the action in which they had initially sought to intervene. R. 78, Ex. 2. Even if Petitioners' motion to intervene in *Jones* did not toll limitations, Petitioners nevertheless timely filed suit because under this Court's holding in *Crown, Cork, and Seal Co. Inc. v. Parker*, 462 U.S. 345 (1983), the pending putative *Jones* class action (which was brought on behalf of all black TDCJ employees, a class which encompassed all of the Petitioners) tolled Petitioners' limitations until September 30, 1991 when class certification in *Jones* was denied. RE.9, p. 91-92. In fact, until denial of certification in *Jones*, Respondents maintained that Petitioners could not litigate their promotion claims because they were encompassed within Jones' class claims. *See, e.g.*, R.68, p. 6. Given that class certification was not denied in *Jones* until 1991, it is difficult to understand how the Court of Appeals believed Petitioners' claims were barred in 1988.

In addition to Petitioners' right to tolling due to the pendency of the putative *Jones* class action, Petitioners should also have been able to rely on equitable tolling since they acted pursuant to an explicit judicial order. *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984). Equitable tolling should also have been available to Petitioners because Respondents attempted to block Petitioners' filing suit by arguing that Petitioners' promotion claims were on hold until *Jones* was resolved. *Id.*; R.68, p. 6.

If the Court of Appeal's Opinion is allowed to stand, then the federal courts will be burdened with duplicative actions because parties will no longer be able to rely on the well reasoned tolling decisions of this Court. Therefore, for reasons of judicial efficiency (as well as *stare decisis*), this Court should grant the writ to correct the erroneous decision of the Court of Appeals.

CONCLUSION

For the reasons stated above Petitioners request that this Court issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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